BAIL SLIP

1. That the Second Petitioner/Second Petitioner (Accused 2) namely V.P. Subramaniam was directed to be released on bail in and by the order of this court dated 13.8.2002 and made in CRL.MP.No.6308 of 2002 in CRL.R.C.No.1303 of 2002.

2. That the Third Petitioner (Accused 4) namely S.Rathinambal was directed to be released on bail in and by the order of this court dated 11.7.2002 and made in CRL.MP.No.6308 of 2002 in CRL.R.C.No.1303 of 2002.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

CRL.R.C.NO.1303 OF 2002

1. M/s Bannari Amman Mills
2. V.P.Subramaniam
   S/o Palanisamy
   Managing Partner
   M/s Bannari Amman Mills
3. S.Rathinambal .. Petitioners(Accused 1,2 and 4)

-vs-

Fenner (India) Ltd.,
Textiles Division
rep. by Senior Officer-Commercial
Madheswaran .. Respondent (Complainant)

This Revision is filed under section 397 r/w 401 of Crl.Pc against the order passed by Additional Sessions Judge(Fast Track Court -2) Salem in C.A.No.175 of 2000 dated 26.6.2002 confirming the Judgment passed by the learned Judicial Magistrate No.2, Salem in C.C.No.55 of 1998 dated 13.10.2000.

For petitioners : : Mr.R.Rajan and
Mr.B.Vasudevan
For respondent : : Mr.V.Srinivasan.

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O R D E R

This revision has been preferred against the order passed in C.A.No.175 of 2000 on the file of the Court of Additional Sessions Judge(Fast Track Court-2) Salem. A private complaint under Section 200 Cr.P.C. for an offence under Section 138 of the Negotiable Instruments Act,1881 was originally preferred by Fenner (India) Private Limited against four accused, A1 to A4. Pending trial A3 is dead.

2. In the complaint, the complainant would allege that in A1 Company A2,A3 and A4 are the Directors and the accused used to purchase cotton from the complainant and in the said dealing a sum of Rs.3,88,500/- was due to the complainant from the accused in connection with the purchase of 70 bags of cotton and to discharge the said amount, A3 as one of the partners of the first accused Company, had drawn a cheque for Rs.3,88,500/- in favour of the complainant and when the same was presented in Vijaya Bank, Tirupur for collection, the same was returned with an endorsement that "there was no sufficient funds in the account of the drawer. Hence the complaint.

3. The said complaint was taken on file by the leared Additional District Sessions Judge(Fast Track Court-2) Salem as C.C.No.55 of 1998 and on appearance of the accused on summons, the learned trial Judge has furnished copies under Section 207Cr.P.C. to the accused and when the offence was explained to the accused, they pleaded not guilty.

4. Before the trial Court, P.Ws 1 to 3 were examined and Exs P1 to P13 were marked.

4a)P.W.1 Thiru Madheswaran is the Commercial Officer of the complainant company which is situate in door No.7/54,Junction Road, I.T.L Garden Complex, III Floor, Salem-4. According to P.W.1, the complainant Company is producing cotton yarn and that the Directors of the Company have given power of attorney to him to file this complaint. Ex P1 is the power of attorney in favour of P.W.1. P.W.1 would depose that A1 is a partnership company situate at 3/602 Saithan Chettiar Garden, Tirupur and A2 ,A3 and A4 are the partners of A1 Company and that, day to day affairs being looked after by A3 and that A2 and A4 are looking after the administration of the Company and on 14.2.1997 A3 had contacted him over phone and ordered 70 bags of cotton yarn and accordingly the complainant had despatched the consignment under invoice No.251. Ex P2 is the said invoice. On the very same day, the accused have taken delivery of the consignment. According to P.W1, the value of the consignment delivered to the accused is Rs.3,88,500/-. But inspite of repeated

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demands, the accused have not settled the account. On 9.8.1997, A3 had drawn a cheque in favour of the complainant Company for Rs.3,88,500/- in Vijaya Bank,Tirupur Branch. As requested by A3, the said cheque was presented in State Bank of India, Tirupur Branch for collection. But the said cheque was returned by Vijaya Bank, Tirupur Branch on 23.8.1997 on the ground that there was no sufficient funds in the drawer's account. When this was informed to A3, he had again requested the complainant to re-present the same after four weeks and as per his request, the said cheque was re-presented once again on 24.9.1997 for collection in the State Bank of India, Salem Branch. Again the cheque was met with the same fate. Ex P4 is a memo given by Vijaya Bank, Tirupur Branch to the complainant along with the dishonoured cheque. Under Ex P5, the State Bank of India, Salem Branch have deducted the commission charges for the dishonoured cheque from the account of the complainant. A lawyer's notice was issued by the complainant. A copy of the said notice is Ex P6. A1, A2 and A4 have received the notice on 22.10.1997 under Exs P7,P8 and P9 acknowledgments. A3 has refused to receive the notice. The returned cover containing the original of Ex P6 notice is Ex P10. Since the accused have not chosen to send either reply or repaid the amount, the complainant has preferred this complaint on 1.12.1997.

4b) P.W.2 is the Manager of State Bank of India, Salem Branch. He would depose that Ex P3 cheque was presented by the complainant through State Bank of India, Fort Branch on 9.8.1997 for collection. The said cheque forwarded to Vijaya Bank,Tirupur for collection. But the same was returned with an endorsement that the drawer of the Company had no sufficient funds in his account. Ex P4 is the intimation memo received from Vijaya Bank,Tirupur Branch along with dishonoured cheque. The said dishonoured cheque was returned to the complainant on 14.10.1997 along with Ex P5 memo.

4c)P.W.3 is the Branch Manager of Vijaya Bank, Tirupur Branch. He would depose that the accused are having Current Account in their Bank and the Current Account Number is 1008. He would admit that Ex P1 cheque was issued by their bank to the accused along with the cheque book and that Ex P1 cheque was received at their branch on 23.8.1997 from State Bank of India, Salem for collection and that the said cheque was returned with an endorsement that there is no sufficient funds in the drawer's account and that Ex P11 is the statement of account for Current Account No.1008 stands in the name of the accused and as per the statement of account on the day of drawel of the cheque , there was only Rs.760/- remains in the credit of the said account in favour of the accused. Ex P12 is the application form given by the accused for opening the current acccount in Vijaya Bank ,Tirupur Branch. P.W.3 would further say that on 26.11.1997, the accused have closed the current account and to that effect an entry has been made in Ex P.11.

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5. After going through the oral and documentary evidence, the learned trial Judge has held that an offence under Section 138 of the Negotiable Instruments Act,1881 has been made out against the accused and accordingly, he has convicted and sentenced A1, A2 and A4 to pay a fine of Rs.5000/- each with default sentence. Further A2 and A4 have been sentenced to undergo one year rigorous imprisonment each. Aggrieved by the findings of the learned trial Judge, A1, A2 and A4 have preferred this revision. Pending trial, A3 died. In the appeal, the learned Additional District Sessions Judge(Fast Track Court-2) Salem in C.A.No.175 of 2000, after scanning the entire evidence and also after giving due deliberation of the arguments advanced by the learned counsel on both sides, has held that there is no ground made for interference with the Judgment of the trial Judge and accordingly dismissed the appeal preferred by A1,A2 and A4 thereby confirming the Judgment of the learned trial Judge. Hence the revision before this Court by the convicted accused.

6. Now the point for determination in this revision is whether an offence under Section 138 of the Negotiable Instruments Act,1881 has been made out against the revision petitioners/A1, A2 and A4 to warrant conviction? or whether the findings of the learned first appellate Judge/Fast track Court-2) in C.A.No.175 of 2000 is liable to be set aside the for the reasons stated in the memorandum of revision?

7. The Point:
Under Section 141(2) of the Negotiable Instruments Act,1881 if an offence is said to have been committed by a company, the complainant is entitled to proceed against any Director, Manager , Secretary or other officer of the Company and they are guilty of that offence if the complainant proves that only with a consent or connivance with the accused the offence under Section 138 of the Negotiable Instruments Act,1881 has been committed.
Section 141(2) of the Negotiable Instruments Act 1881 reads as follows:

> "Notwithstanding anything contained in sub-section (1), where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
> Explanation:For the purpose of this section

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(a)"company" means any body corporate and includes a firm or other association of individuals; and
(b)"director" in relating to a firm, means a partner in the firm."

According to P.W.1, ExP3 dishonoured cheque was drawn for Rs.3,88,500/- by the third accused as one of the partners of the first accused company and a notice under Ex P6 was issued to A1 to A4 and that A1,A2 and A4 have received a notice on 22.10.1997 under Exs P7 ,P8 and P9 acknowledgements respectively and that A3 has refused to receive the notice and the returned cover containing the original of Ex P6 notice is ExP10.

8. Now we have to consider as to whether sufficent notice has been served to A1, A2 and a4 as contemplated under Section 138(b) of the Negotiable Instruments Act,1881.

9. The learned counsel appearing for the revision petitioners would contend that there was no service of notice as contemplated under section 138 (b) of the Negotiable Instruments Act,1881 on the revision petitioners viz., A1, A2 and A4. A perusal of the copy of the notice under Ex P6 itself will go to show that the name of A1, A2 and A4 was not mentioned in Ex P6 notice. Both A2 and A4 have been addressed by their designation and not by their name .In Ex P6 notice, A2 has been addressed as managing partner and A4 has been addressed as a partner of A1 company. On the other hand, A3's name K.P.Muthukumar finds a place in Ex P6 notice. It is pertinent to note further that in the acknowledgments in Exs P7,P8 and P9 relating to A1,A2 and A4 also A3 has acknowledged for having received the notice . So there is absolutely no evidence to show that A2 and A4 have been served with a mandatory notice as contemplated under Section 138(b) of the Negotiable Instruments Act,1881.

10. The learned counsel appearing for the revision petitioners would focus the attention of this Court to the recent judgment delivered by a Division Bench of this Court in B.Raman and two others-vs-M/s Shasun Chemicals and Drugs Ltd(2006-2 L.W.(crl.) 775). The question that was posed before the Division Bench was: " In the absence of individual notice under Section 138(b) of the Negotiable Instruments Act,1881 to be served on the director of a company, can the said director be prosecuted for the offence, committed by the company, under Section 138 of the Act? The said Judgment was delivered by the Honourable Justice M.Karpagavinayagam(then as he was) present Chief Justice of High Court of Jhargand and I am also a member of the said Division Bench. At paragraph 22, It has been observed in the Judgment as follows which is relevant for the purpose of deciding this revision:

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" In the light of the above observation made by the Supreme Court, out of five ingredients, which have to be established for creating criminal liability against the persons concerned, fourth and fifth ingredients viz., service of statutory notice on the person sought to be made liable and non-compliance or non-payment in pursuance of the notice within 15 days of the receipt of the notice, play an important role. In other words, every person, connected with the company, shall not fall within the ambit of the provision. It is only those persons, who were in charge of and responsible for the conduct of the business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that a director of a company, who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. Conversely, a person not holding any office or designation may be liable if the complainant satisfies that that person was in charge of and responsible for the conduct of business of the company at the relevant time. To put it differently, liability depends on the role one plays in the affairs of a company and not on designation or status. Merely mentioning that he is a director or manager or secretary would not be enough, to cause criminal liability. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time can be subjected to action."

The purpose of the issuance of notice under Section 138(b) of the Negotiable Instruments Act,1881 to the director or manager or secretary of the Company is to give an opportunity for him to explain in what way he is connected with the cheque drawn by one of the directors managers or partners. This opportunity has been denied in this case in respect of the revision petitioners because there was no service of notice at all against the revision petitioners as contemplated under section 138(b) of the Negotiable Instruments Act,1881 because all the notices have been received only by A3 as seen from Exs P7,P8 and P9. Under such circumstances, this Court is necessarily to interfere with the findings of the learned first

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appellate Judge in C.A.No.175 of 2000 on the file of the Additional District Sessions Judge(Fast Track Court-2) Salem. Point is answered accordingly.

11. In the result, the revision is allowed , Judgment in C.A.No.175 of 2000 on the file of the Court of Additional District Sessions Judge(Fast Track Court-2) Salem is set aside and the revision petitioners are acquitted from the charge levelled against them. The fine amount, if any, paid is to be refunded to the revision petitioners.

sg

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Additional District Sessions Judge
   (Fast Track Court-2) Salem

2. Do Through The Prl Sessions Judge, Salem.

3. The Judicial Magistrate, NO.2, Salem

4. Do Thro' The Chief Judicial Magistrate,
   Salem.

5. The Superintendent,
   Central Prison, Salem.

6. The Public Prosecutor,
   High Court, Madras.

+ 1 cc to Mr. B. Vasudevan, Advocate SR No. 19772

+ 1 cc to Mr. S. Kalyanaraman, Advocate SR No. 20074

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